Statements by the United States at the Meeting of the WTO Dispute Settlement Body
Geneva, February 26, 2014

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

   A. UNITED STATES - SECTION 211 OMNIBUS APPROPRIATIONS ACT OF 1998: STATUS REPORT BY THE UNITED STATES (WT/DS176/11/ADD.134)

- The United States provided a status report in this dispute on February 13, 2014, in accordance with Article 21.6 of the DSU.

- At least six bills have been introduced in the current Congress in relation to the DSB's recommendations and rulings in this dispute. These include H.R. 214, H.R. 778, H.R. 872, H.R. 873, H.R. 1917, and S. 647.

- The U.S. Administration will continue to work on solutions to implement the DSB's recommendations and rulings.

Second Intervention

- We would like to make two points in response to the comments made today.

- First, in response to comments about systemic concerns about the dispute settlement system, the facts simply do not justify such concerns. The record is clear: the United States has come into compliance, fully and promptly, in the vast majority of its disputes.

- As for the remaining few instances where our efforts to do so have not been entirely successful, the United States is actively working toward compliance.

- Second, there were references today to actions that the United States has recently taken to protect its intellectual property rights internationally in the territories of other Members. It is of course true that the United States has been and remains a strong advocate of substantial protections for intellectual property rights internationally. However, any suggestion that we do not apply the same high standard in our own territory is unfounded and ill-placed.

- In this regard, Members should recall that Section 211 addresses the uncompensated expropriation of assets or businesses. Members should also recall that the Appellate Body in this dispute did not challenge the right of the United States to refuse recognition "in its own territory [to] trademarks, trade names or other rights relating to any intellectual property or other property rights that ... have been expropriated or otherwise confiscated in other territories." Instead, the Appellate Body found that – when a Member chooses not to recognize intellectual property rights in its own territory relating

to a confiscation of rights in another territory – its measures must comport with the national treatment and MFN obligations of the TRIPS Agreement.

- I hope that this explanation helps clarify any concerns about any potential inconsistency in the U.S. position.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

B. UNITED STATES - ANTI-DUMPING MEASURES ON CERTAIN HOT-ROLLED STEEL PRODUCTS FROM JAPAN: STATUS REPORT BY THE UNITED STATES (WT/DS184/15/ADD.134)

- The United States provided a status report in this dispute on February 13, 2014, in accordance with Article 21.6 of the DSU.

- The United States has addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue.

- With respect to the recommendations and rulings of the DSB that have yet to be addressed, the U.S. Administration will work with the U.S. Congress with respect to appropriate statutory measures that would resolve the matter.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

C. UNITED STATES - SECTION 110(5) OF THE US COPYRIGHT ACT: STATUS REPORT BY THE UNITED STATES (WT/DS160/24/ADD.109)

- The United States provided a status report in this dispute on February 13, 2014, in accordance with Article 21.6 of the DSU.

- The U.S. Administration will continue to confer with the European Union, and to work closely with the U.S. Congress, in order to reach a mutually satisfactory resolution of this matter.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

D. EUROPEAN COMMUNITIES - MEASURES AFFECTING THE APPROVAL AND MARKETING OF BIOTECH PRODUCTS: STATUS REPORT BY THE EUROPEAN UNION (WT/DS291/37/ADD.72)

- The United States thanks the EU for its status report and its statement today.

- As the United States recalled most recently at the January DSB meeting, the EU has yet to address the product-specific DSB recommendation and ruling with respect to a variety of biotech corn known as BT-1507. The EU also raised this issue today. The application for approval of this product has been pending since 2001. In 2006, the DSB found that the EU had breached its WTO obligations with respect to this product by not undertaking and completing approval procedures without undue delay.[1]

- The United States in this regard also takes note that the EU's own scientific authority has issued positive opinions on this application for approval at least six times between 2005 and 2012.

- In a development that was referred to by the EU, the United States understands that earlier this month, the EU Council considered a regulation that finally would have authorized the approval of this product.

- We regret, however, that apparently the EU Council has declined to adopt the regulation.

- The United States further notes that the difficulties that have been faced by this application exemplify the problems with EU measures affecting the approval of biotech products, and we urge the EU to take steps to address these matters.

- However, in regard to the EU's intervention today, it would be useful to get a clarification. The EU stated that the Commission may take some sort of action with respect to this product and may approve it despite the fact that the Council did not adopt the regulation. Could the EU please clarify the status of the situation?

<u>Second Intervention</u>

- Although this would be a positive development, it also exemplifies the problems with EU measures affecting the approval of biotech products generally. Additional action by the Commission in the face of EU Council opposition is an extraordinary procedural step,

[1] *European Communities — Measures Affecting the Approval and Marketing of Biotech Products* (WT/DS291/R), adopted Nov. 21, 2006, at para. 8.18(a)(xi).

and inevitably results in substantial delays.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

F. UNITED STATES - ANTI-DUMPING MEASURES ON CERTAIN SHRIMP FROM VIET NAM (WT/DS404/11/ADD.20)

- The United States provided a status report in this dispute on February 13, 2014, in accordance with Article 21.6 of the DSU.

- As we have noted at past DSB meetings, the U.S. Department of Commerce published a modification to its procedures in February 2012 in order to implement the DSB's recommendations and rulings regarding the use of "zeroing" in anti-dumping reviews. This modification addresses certain findings in this dispute.

- The United States will continue to consult with interested parties as it works to address the recommendations and rulings of the DSB.

2. UNITED STATES - CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

A. STATEMENTS BY THE EUROPEAN UNION AND JAPAN

- As we have noted at previous DSB meetings, the President signed the Deficit Reduction Act into law in 2006, including a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Accordingly, the United States has taken all actions necessary to implement the DSB's recommendations and rulings in these disputes.

- As Members have acknowledged during previous DSB meetings, the 2006 Deficit Reduction Act does not permit the distribution of duties collected on goods entered after October 1, 2007.

- Therefore, we do not understand the purpose for which the EU and Japan have inscribed this item today.

- With respect to comments regarding further status reports, as we have already explained at previous DSB meetings, we fail to see what purpose would be served by further submission of status reports, which would merely repeat what we have said here today.

3. CHINA - CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES

A. STATEMENT BY THE UNITED STATES

- The United States continues to have serious concerns that China has not implemented the DSB's recommendations and rulings in this dispute.

- Following China's adoption of measures purportedly taken to implement the DSB's recommendations and rulings, foreign suppliers of electronic payment services still cannot do business within China in China's local currency. In particular, China imposes a licensing requirement, but provides no criteria or procedures for foreign suppliers to be approved.

- The result of this is a ban on foreign EPS suppliers.

- And China Union Pay – which is China's own domestic champion – remains the only EPS company that has ever been able to operate in China's domestic market.

- Yet the DSB's recommendations and rulings in this dispute state that China has both market access and national treatment commitments concerning Mode 3 for electronic payment services.[2]

- At prior DSB meetings, China has taken the extraordinary position that these particular DSB findings are not relevant for it to comply with its WTO obligations. However, China has no basis for such assertions.

- China also stated at last month's DSB meeting that it is working on the necessary regulations that would allow for the licensing of foreign EPS suppliers. Unfortunately, the United States has not seen any evidence that such regulations have been issued.

- We call upon China to inform the DSB of the issuance of a regulation that would allow for the licensing of foreign EPS suppliers, and we again encourage China to meet its obligations to implement the DSB recommendations and rulings in this dispute.

<u>Second Intervention</u>

- As we have stated before, we strongly disagree with China's statement and its assertion that it is in full compliance. Further, China's statement that language in the report adopted by the DSB that "China has made a commitment on market access concerning

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[2] *China – Certain Measures Affecting Electronic Payment Services*, WT/DS413/R (adopted Aug. 31, 2012), paras. 7.575, 7.678.

mode 3" and that "China has made a commitment on national treatment concerning mode 3" are merely "precursors" and not really findings or recommendations and rulings is extremely troubling.

- It would be a significant repudiation of China's obligations for China to disagree with these findings of the panel adopted by the DSB that define China's commitments and are the core of the dispute.

- China knows, and we all know, that China has commitments here, and we would encourage China to live up to them.

4. UNITED STATES - MEASURES AFFECTING THE CROSS BORDER SUPPLY OF GAMBLING AND BETTING SERVICES

A. STATEMENT BY ANTIGUA AND BARBUDA REGARDING THE IMPLEMENTATION OF THE RECOMMENDATIONS AND RULINGS ADOPTED BY THE DSB

- The United States remains committed to constructive dialogue with Antigua to resolve this matter and has been open to meeting with Antigua on this matter at many different levels of the U.S. government. I think that some of the comments that we have heard today that have implied that we are not working in good faith are inaccurate and very unfortunate.

- As a policy, we typically do not comment publicly on ongoing negotiations. But, it is important to note that contrary to statements we heard today, at a meeting last fall in Washington, the United States presented, in good faith, a range of items that could be part of a final settlement package. We continue to await Antigua's answer to the settlement package we have presented. But, in any event, the United States remains ready to engage with Antigua on these issues.

- With respect to the suggestion that this matter be referred to mediation or good offices with the D-G, the United States considers that a serious effort to re-engage in negotiations would be more productive than referring the matter to the Director General.

- In relation to the statement on further DSB surveillance/status reports, the United States recalls that it has invoked the GATS Article XXI process to withdraw the gambling concession at issue in this dispute. In fact, the United States has reached agreement with *all other* Members to complete that process by offering substantial new services concessions. Only Antigua prevents completion of the WTO process.

- Thus, again, it is inappropriate to suggest that we have not been trying to resolve this matter in good faith. The United States has been trying to work through the GATS Article XXI process, and we have been trying to engage with Antigua. We think that the GATS Article XXI process is the proper forum for further discussion of this matter, not the DSB. We will continue to engage in these efforts and hope that Antigua and Barbuda will as well.

<u>Second Intervention</u>

- We appreciate the comment from Trinidad and Tobago about negotiation. We remain of the view that a negotiated resolution is the best outcome here, and we remain ready to try through negotiation to resolve this matter.

5. UNITED STATES - MEASURES AFFECTING THE PRODUCTION AND SALE OF CLOVE CIGARETTES

A. COMMUNICATION FROM THE EUROPEAN UNION (WT/DS406/15)

- The United States appreciates that the European Union has chosen to place this item on the proposed agenda for today's meeting in accordance with the 10-day rule set out in Rules 2, 3, and 4 of the DSB's rules of procedure.[3]

- As we noted at last month's DSB meeting, placing this item on the proposed agenda gives us all advance notice of items to be raised at the DSB meeting and provides delegations with an opportunity to confer with capital, receive instructions, and to engage in the discussion, as they consider appropriate. I was glad to hear numerous other Members echo this point today.

- This is the appropriate way to proceed under the DSB's rules of procedure. On the other hand, raising an item under "Other Business," as occurred last month, denies Members advance notice and equal notice of the matter to be raised, and therefore disadvantages any Member that the delegation making the statement has not specifically selected to receive a "heads-up."

- Placing the item on the agenda today as a regular item also helps avoid engaging in a discussion on substantive issues under "Other Business." Such a discussion, as occurred at last month's meeting, is contrary to Rule 25 of the DSB's rules of procedure. Therefore, we do appreciate the EU's more transparent and more inclusive approach consistent with the DSB's rules of procedure this month.

- With respect to the EU's written communication, the United States considers that this is a transparent means of informing Members of issues of interest to the EU in advance of this meeting. In that regard, we do welcome the EU's recognition that communications circulated in a DS document series can be a valuable means for a Member to share its views with all WTO Members, and the evolution in the EU's thinking since previously expressing a view to the DSB.[4]

- Turning to the substantive issues, the United States would observe that these are not new issues, but are issues that have been addressed by arbitrators in past proceedings, including in arbitration proceedings to which the EU has been a party, and which Ecuador referenced in its statement.

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[3] Rules of Procedure for Meetings of the General Council, WT/L/161 (applicable to meetings of the DSB, WT/DSB/9).

[4] *See* WT/DSB/M/254, paras. 74, 86 (22 October 2008).

- As a result, we do not understand the basis for the EU's concerns, nor the "urgency" necessitating the statement at last month's DSB meeting.

- The first issue raised involves initiating compliance proceedings under Article 21.5 rather than requesting authorization under Article 22.2 of the DSU. As we have noted, we would have preferred to have concluded such a so-called "sequencing" agreement with Indonesia as it initially had proposed.

- However, Indonesia changed course and instead decided to act on its view that sequencing is not required under the DSU and that issues of compliance may be resolved as part of the Article 22 arbitration. We hear Indonesia repeat that view again today.

- On the one hand, we strongly disagree with Indonesia's statement that we have taken no steps to come into compliance in this matter. That is absolutely not the case and is a subject in the ongoing proceedings.

- Nonetheless, while we may disagree on that, we do not disagree with Indonesia's reading of the DSU. This is a reading that was confirmed by the arbitrator in *EC - Bananas III.* In that dispute, the EU made a claim of compliance, and the compliance issue was resolved in the course of the Article 22.6 arbitration, without recourse to 21.5. We disagree with the contrary notion expressed by some today that Members are instead required to seek recourse to Article 21.5 if the parties to the dispute disagree on compliance.

- For these reasons, we do not see this as an open issue nor do we see the point in seeking to re-visit this issue at the DSB.

- Similarly, with respect to the issue of what the EU characterizes as third party "rights," the DSU is clear in not providing for third party participation in such proceedings. We appreciate that India has pointed to this lack of any textual basis today as well.

- And while the EU characterizes its request as one conferring "rights," it is important to note that its request would in fact impose additional "obligations" on the parties. The DSU is explicit that the dispute settlement system "serves to *preserve* the rights and obligations of Members under the covered agreements" and not to add to those obligations.[5] We therefore do not see how an arbitrator or adjudicator could grant a request to impose additional obligations on a Member not agreed to in the DSU.

- Finally, we note the EU appears to now want to refer to arbitrators by a new name – as a "compliance/arbitrator panel." But, using different terminology cannot amend the DSU

[5] DSU, Article 3.2.

or transform the legal nature of the Article 22.6 arbitration.

8. UNITED STATES - CERTAIN METHODOLOGIES AND THEIR APPLICATION TO ANTI-DUMPING PROCEEDINGS INVOLVING CHINA

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY CHINA (WT/DS471/5)

- The United States has consulted with China with regard to the matters raised in China's request for consultations.

- We have explained to China that the measures in its request – to the extent that they have been properly identified – are fully consistent with U.S. obligations under the WTO Agreement.

- Accordingly, the United States is not in a position to agree to the establishment of a panel today.

9. CHINA - COUNTERVAILING AND ANTI-DUMPING DUTIES ON GRAIN ORIENTED FLAT-ROLLED ELECTRICAL STEEL FROM THE UNITED STATES

A. RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES: REQUEST FOR THE ESTABLISHMENT OF A PANEL (WT/DS414/16)

- On November 16, 2012, the DSB adopted its recommendations and rulings in the dispute *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States* ("*China – GOES*").

- Members will recall the DSB findings that China imposed antidumping and countervailing duties on U.S. exports of GOES in a manner that breached China's obligations under the AD and SCM Agreements. The DSB recommended that China bring its measures into conformity with these agreements.

- The arbitrator appointed under DSU Article 21.3(c) to determine China's RPT provided China until July 31, 2013 to implement the DSB's recommendations and rulings. On that date, China issued a re-determination related to the duties at issue in this dispute. The re-determination continued the imposition of antidumping and countervailing duties on imports of GOES from the United States.

- The United States considers that China has failed to bring its measures into conformity with the covered agreements, and the United States is seeking recourse to Article 21.5 of the DSU.

- The apparent inconsistencies between China's re-determination and its obligations under the AD and SCM Agreements are set out in the U.S. request for the establishment of a panel. They include the following briefly:

  - First, China has failed to support its price effects findings with positive evidence and to objectively examine the related evidence;

  - Second, China has failed to support its findings that GOES from the U.S. negatively impacted the domestic industry with positive evidence and to objectively examine the related evidence;

  - Third, China has failed to base its analysis of the alleged causal relationship between GOES from the U.S. and injury to the domestic industry on positive evidence, and has failed to objectively examine the related evidence;

  - Fourth, China has attributed injuries caused by other factors to the dumped and subsidized imports;

- Fifth, China has failed to disclose essential facts underlying its conclusions; and

- Lastly, China has failed to provide an adequate explanation of its calculations and legal conclusions.

- For these reasons, the United States seeks recourse to Article 21.5 of the DSU and requests that the DSB refer the matter set out in the U.S. panel request to the original panel, wherever possible.

10. AB SELECTION PROCESS UPDATE

- As the Chairman noted, we all received a fax from the Selection Committee recommending that the DSB commence as soon as practicable a new selection process, to be carried out by the Director-General and the 2014 Chairpersons.

- As we noted at last month's DSB, we view the current situation and this type of step forward as far from an ideal outcome. However, given the Selection Committee's view that consensus would not be reached on any of the prior candidates, the United States would support the recommendation of the Selection Committee to commence a new selection process.

- The United States does not believe that voting is an appropriate or permissible way of resolving the Selection Committee's inability to reach a consensus. The DSU is explicit that DSB decisions are taken by consensus, unless the DSB provides otherwise. A move to voting would have systemic consequences for the WTO as a whole that all Members would need to seriously reflect on.

- Taking this type of action would also threaten to politicize the Appellate Body selection process in this particular instance and in the future.